NO. 57308-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SOUND ACTION,

Appellant,

v.

MARCUS GERLACH and WASHINGTON STATE DEPARTMENT OF FISH AND WILDLIFE,

Respondents.

DEPARTMENT'S RESPONSE BRIEF

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I. INTRODUCTION

This case highlights the due diligence performed by the Washington Department of Fish and Wildlife (WDFW) when an agency biologist issued Co-respondent Marcus Gerlach one of the most customized, individualized, and carefully crafted permits for a hydraulic project seven years after Mr. Gerlach first applied. Through this appeal, the non-profit advocacy organization Sound Action seeks to eliminate the deference owed to WDFW's expertise—both the legal deference due to WDFW's interpretation and application of its own rules, and the scientific deference owed to biologists versed in environmental sciences, and the species they protect. Sound Action seeks to dictate WDFW's regulatory response to specious scientific conclusions by calling into question the hydraulic project approval (HPA) and application process.

In issuing the HPA at issue in this matter, WDFW Habitat Biologist Nam Siu made several carefully considered decisions for the benefit of the resource. He identified impacts to fish life,

but more importantly here, he determined what impacts to fish life would not occur on Mr. Gerlach's property. Using his education, training, and experience, combined with his personal knowledge of the site-specific characteristics, he issued a permit with corresponding mitigation to adequately ensure protection of fish life. Two reviewing tribunals have upheld the permitting decision and WDFW's application of the law as correct, and this Court should also affirm the Pollution Control Hearings Board's Findings of Fact, Conclusions of Law, and Order upholding that permit.

II. COUNTER STATEMENT OF FACTS

Co-Respondent Marcus Gerlach owns waterfront property in the City of Bainbridge Island, including the tidelands. On August 13, 2012, he submitted to WDFW an application for Hydraulic Project Approval (HPA) to construct a new bulkhead, pier, ramp, and float at his residence located in Eagle Harbor. Agency Record (AR) 1389–1405. Eagle Harbor is an inlet of the saltwater of Puget Sound in Kitsap County. It is a heavily

developed area. Verbatim Report of Proceedings (VRP) 581–82. Mr. Gerlach's application included a Joint Aquatic Resource Permit Application (JARPA)[1] and plans drawn up by an engineer. AR 1389–1405, 1410–16. Over the next several years, Mr. Gerlach litigated the City of Bainbridge Island's permitting decision and proposed some modifications to the project. WDFW delayed processing the HPA application until those controversies resolved. AR 1236–1239, 1246, 1447–1448.

WDFW reexamined his application in February of 2019, and determined that the project had complied with the provisions in the State Environmental Protection Act (RCW 43.21C) when Mr. Gerlach resubmitted his application after the litigation ended. AR 1480–81. WDFW then assigned a habitat biologist

[1] The JARPA is designed for an applicant to complete and submit one form to both the WDFW and U.S. Army Corps of Engineers for shoreline construction projects. It is also accepted by the Department of Ecology, Department of Natural Resources, Environmental Protection Agency and U.S. Coast Guard for certain regulatory applications.

familiar with the area and processed Mr. Gerlach's application under the law current at the time. AR 1471–79.

A. WDFW's HPA program implements the Hydraulic Code, reflecting the best available science for the protection of fish life.

Washington Administrative Code (WAC) Chapter 220-660, commonly known as the "Hydraulic Code," implements Chapter 77.55 RCW and governs WDFW's HPA program. VRP 504; *see generally* WAC 220-660. A "hydraulic project" is work that uses, diverts, obstructs, or changes the flow or bed of the state's salt and freshwaters. RCW 77.55.011(11); WAC 220-660-030(78). An HPA is written approval for such a project "as to the adequacy of the means proposed for the protection of fish life." WAC 220-660-030(79); RCW 77.55.021(1). "Protection of fish life" means "avoiding, minimizing unavoidable impacts, and compensating for remaining impacts to fish life and the habitat that supports fish life through mitigation sequencing." WAC 220-660-030(121).

The technical provisions in WAC 220-660 are those that WDFW has determined adequately avoid and minimize impacts posed by hydraulic projects. WAC 220-660-090. The technical provisions follow the mitigation sequence to first avoid, then minimize, and finally compensate for impacts to fish life. *See* WAC 220-660-030(104). Following the mitigation sequence must result in no net loss to fish life. WAC 220-660-030(110); WAC 220-660-080(1).

The Department's habitat biologists look at scientific research, site-specific characteristics, and the nature of work proposed to assess site-specific impacts to fish life of a given hydraulic project. The Department engages in review of the scientific literature, sometimes at the urging of Sound Action, to update the Hydraulic Code and its internal policies. VRP 75, 78–79, 506-08. The technical provisions of the Hydraulic Code also "reflect the current and best science, technology, and construction practices related to the protection of fish life" and WDFW will "incorporate new science and technology as it

becomes available, and will allow alternative practices that provide equal or greater protection for fish life." WAC 220-660-020. Protection of fish life is the only ground upon which approval of a permit may be denied or conditioned, and "[a]pproval of a permit may not be unreasonably withheld or unreasonably conditioned." RCW 77.55.021(7)(a).

B. The Hydraulic Code contains procedural requirements of a complete application before full WDFW review of a project.

Once the Department receives a complete application, it has 45 calendar days to grant or deny approval of a permit, though that time requirement can be extended or waived for several reasons. RCW 77.55.021(7)(b). The components of a complete application for an HPA are found in both statute and the Hydraulic Code. RCW 77.55.021(2); WAC 220-660-050(9). The Hydraulic Code also proscribes the Department's steps when it receives an incomplete application, including assistance to the applicant by identifying the deficiencies and what

information is needed to complete the application. WAC 220-660-050(10).

A complete application consists of both substantive and procedural elements. WDFW must receive from the applicant written notice of "compliance with any applicable requirements of the State Environmental Policy Act." RCW 77.55.021(2)(d); WAC 220-660-050(9)(c). Compliance with the State Environmental Policy Act (SEPA) is a procedural element of an application, not a substantive one. VRP 513, 550. While WDFW may provide comments to a lead agency conducting a SEPA review, the SEPA determination itself does not influence WDFW's HPA permitting, consistent with it as a procedural application requirement rather than a substantive element. VRP 513 (a biologist's disagreement with a lead agency's SEPA determination is not grounds to deny an HPA); VRP 550 (receipt of a lead agency's SEPA determination, even if WDFW disagrees with the conclusions, is considered compliance with requirements of the SEPA process).

On July 31, 2012, Mr. Gerlach applied for a Shoreline Substantial Development Permit (shoreline permit) from the City of Bainbridge Island "to build a 110 linear-foot bulkhead; a 174-foot dock; a 196 square-foot gatehouse/boathouse; and a 50 linear-foot retaining wall…" AR 1367–88, 1444–46. Mr. Gerlach submitted a SEPA checklist pertaining to "installation of a bulkhead, recreational pier, boarding float, and gatehouse" and answered environmental impact questions about all elements, including the bulkhead. AR 1367–88.

Ultimately, the City issued a shoreline permit, but denied permission to build the bulkhead portion for several reasons, including (1) the project site consisted of marsh habitat; and, (2) the lack of wave erosion at the site. AR 1228. The City based its decision on site-specific conditions, its 2004 Nearshore Assessment Report, and a 2007 ruling of the Shoreline Hearings Board; these enumerated reasons indicate that the City gave due consideration of the bulkhead, not that the City summarily overlooked the bulkhead component. AR 1228–30.

WDFW received from Mr. Gerlach a copy of the City's combined Mitigated Determination of Nonsignificance decision and Shoreline Permit in 2016. AR 1305. That document indicated the City's permitting decision and SEPA decision applicable to the following: "110 linear feet of bulkhead; a 174 foot dock with boat hoist; a 196 square foot gatehouse/boathouse; and a 50 linear foot retaining wall" at "579 Stetson Place (Tax Assessor No. 342502-1-085-2001)." AR 1444. Mr. Gerlach had appealed the decisions in the document, meaning the City's permitting decision and SEPA determination; thus, WDFW determined that until that appeal resolved, the procedural requirements under Chapter 43.21C RCW had yet to be completed. AR 1456. It was not until years later, at Mr. Gerlach's urging, that WDFW took another look at the application and determined it had been completed in 2016 with the resolution of Mr. Gerlach's SEPA litigation with the City. AR 1471–79, 1305–06.

C. WDFW determined Gerlach submitted a complete application and processed it with thorough consideration of site-specific habitat conditions.

Once WDFW's Habitat Program administratively determined Mr. Gerlach completed his application, it assigned Nam Siu, an area habitat biologist familiar with Kitsap County, to process the application. Decisions regarding the completeness of an application are administrative and made by staff at WDFW's headquarters, not by a biologist. VRP 519. Though other WDFW biologists had discussed the project with Mr. Gerlach previously, Mr. Siu conducted the first substantive review of the application with "fresh eyes." VRP 653; *see also* VRP 651. A review of correspondence between WDFW and Mr. Gerlach indicates some Department employees provided Mr. Gerlach advice and assistance on the incomplete application, but the evidence undisputedly shows that the only meaningful review of Mr. Gerlach's application for the protection of fish life occurred by Mr. Siu in 2019.

Mr. Siu has been a WDFW area habitat biologist since 2017. Previously, Mr. Siu worked at an environmental consulting firm conducting underwater habitat surveys in Puget Sound. VRP 564–69; AR 1311–12. Mr. Siu earned dual Bachelor of Science degrees in marine science and biology, a master's degree in biology with an oceanography emphasis, and has co-authored more than a half dozen peer-reviewed scientific articles. VRP 564–75. His work has taken him to Eagle Harbor many times, and he conducted surveys, above and below water, of "just about every portion of the shoreline within Eagle Harbor" as an environmental consultant. VRP 582. At the hearing, the Presiding Officer ruled Mr. Siu qualified as an expert in marine biology and marine ecosystems of Puget Sound. VRP 572.

After reviewing the Gerlach application file, and noting that it contained variations of a bulkhead, a sand berm, or retaining wall, Mr. Siu met with Mr. Gerlach to ensure he fully understood Mr. Gerlach's intended construction. He confirmed the intent to build what appeared in his 2012 plans—"installation

of a pier, ramp, float, boat lift, and a new 70 foot concrete bulkhead installed at or landward of the OHWL [Ordinary High Water Line]." VRP 643–44; AR 1410–16. For three months in early 2019, Mr. Siu worked with Mr. Gerlach to clarify details of the proposed project, determine impacts to the habitat, and coordinate a site visit. AR 1280–1303; VRP 666–70.

Mr. Siu's familiarity with Eagle Harbor includes the tidelands in front of Mr. Gerlach's property. VRP 590. Mr. Siu has personal knowledge that eelgrass and macroalgae do not grow where Mr. Gerlach intends to build. Additionally, Mr. Gerlach's neighbors provided WDFW a recent underwater vegetation survey of their adjacent tidelands as part of a separate HPA application at the time. *Id*. That report further confirmed what Mr. Siu and WDFW know—an absence of eelgrass or macroalgae in Mr. Gerlach's area of Eagle Harbor.[2]

[2] Only Mr. Siu presented any testimony based on personal knowledge of the habitat conditions on Mr. Gerlach's property. VRP 591.

Although Mr. Gerlach denied Mr. Siu access to his property, Mr. Siu observed the entire project site during a visit to the neighbor's property at a time when a low tide exposed 200 feet of tidelands. VRP 595, 669. Mr. Siu was able to see "the entirety of the footprint of his [Mr. Gerlach's] proposed project" and noted the absence of any macroalgae. *Id.* "So in lieu of actually stepping foot on his site, I stepped foot on his neighboring site, which allowed me to see everything I needed to see." VPR 668.

The only thing Mr. Siu said he could not do without access to the Gerlach property was determine from benchmarks the ordinary high water line; instead he used observations he made from the neighbor's property, photos provided by Mr. Gerlach, and overhead photos and mapping. VRP 668–69. The "ordinary high water line" is an ecological demarcation between the saltwater marine environment and adjacent uplands. VRP 617–20. The best way to determine the ordinary high water line is by looking for the change in vegetation near the shore—*e.g.* the

change from salt-dependent plants (saltgrass) to salt intolerant plants (Mr. Gerlach's residential lawn). VRP 619. Mr. Siu has training from the Department of Ecology specifically in making this determination. VRP 621.

Based on his observations, Mr. Siu determined that, for the purposes of Mr. Gerlach's HPA, the ordinary high water line exists in a straight line parallel to and extending along the face of the foundation of a gatehouse Mr. Gerlach built where the beach meets the lawn. VRP 631, AR 1420–24. The ordinary high water line determination is conservative, and had Mr. Siu been able to access the Gerlach beach and take more precise measurements, he likely would have set the ordinary high water line further toward the water. VRP 636. In fact, Mr. Siu testified he placed the ordinary high water line so conservatively up the beach that a concrete wall on or landward of the line could arguably be called an upland retaining wall. *Id*.

The placement of a bulkhead relative to the ordinary high water line plays a major role in determining the effect, if any, on

the nearshore ecosystem. As Mr. Siu described it, "the lower on the beach the greater the impact … most of the impacts are intertidal and habitat infringement." VRP 621. Besides loss of marine nearshore habitat cut off or replaced by a structure, a bulkhead can impact the introduction of sediment from eroding "feeder bluffs," or interfere with the movement of sediment along the shoreline. VRP 628–630. Mr. Gerlach's beach on Eagle Harbor is a low energy beach with little if any sediment transmission, and his property does not contribute sediment through erosion. *Id.* Thus, Mr. Siu determined that the only impact of a bulkhead would be the loss of habitat by displacing productive shoreline; if a bulkhead were placed at or above the ordinary high water line, where the marine environment ends, there would not be an impact to fish habitat or fish life. VRP 635.

D. The Hydraulic Code identifies affects to fish life from overwater structures and sets requirements for size, height and grating.

The HPA at issue authorizes an overwater structure consisting of a catwalk/pier extending from a newly constructed

gatehouse to an L-shaped pier that would hold a boat hoist on the left side, and a ramp on the right side descending to a floating dock. Mr. Siu knows the effects that residential-sized overwater structures can have on the nearshore marine environment, and how those effects may or may not apply in Eagle Harbor. VRP 596–97.

The two primary impacts of overwater structures on the marine environment come from the loss of habitat as a result of the structure's footprint on the substrate (pilings literally replacing the habitat by their presence), and shade cast by the structures. *Id.* Shade inhibits the growth of underwater vegetation that provides habitat for fish, especially "habitats of special concern" like eelgrass and certain types of kelp. *See* WAC 220-660-320. WDFW's technical requirements for projects to avoid and minimize these impacts in saltwater are based on best available science and contained in the Hydraulic Code. *Id.* Gerlach's project would not impact any "habitats of special concern" as Mr. Gerlach's beach and tidelands are mostly

bare mud and gravel. The only notable vegetation is saltgrass and pickleweed high up on Mr. Gerlach's beach—saltgrass and pickleweed do not provide direct habitat for juvenile salmon, but do host other animals, like sand fleas, that salmon feed upon at high tide. VRP 634. Mr. Siu determined the Gerlach project would not be likely to impact any habitats of special concern. VRP 609.

Shading can also influence the behavior of fish. VRP 597. Of particular concern throughout Puget Sound is the behavior and habitat for migrating juvenile salmonids. *Id.* Those fish tend to stay close to the shore in water that is about a foot deep. *Id.* Shadows cast by overwater structures can affect juvenile salmonids by making them choose whether to change direction and swim into deeper water to go around the shadow. VRP 598–99; *see generally* AR 1602–43.

Sound Action believes this effect on juvenile salmonoid behavior is a negative impact because the juvenile fish expend more energy changing their direction and die because they are

eaten by predators in the deeper water. Mr. Siu is familiar with the scientific research regarding the effects of shading on migrating juvenile salmon and he testified that the state of the science is such that the consequences of these behavior changes have not yet been determined with scientific certainty. VRP 598–99, 758 ("… there's no specific data on literature out there, to my knowledge, that shows increase—that shows data showing significantly increased predation."). Since the science does not convincingly demonstrate the harm of these effects, Mr. Siu determined that he could not impose conditions on Mr. Gerlach's application to address these effects. VRP 758.

E. WDFW conformed the Gerlach project to the Hydraulic Code by including specific construction, technical and siting provisions in the HPA document.

Comparing Mr. Gerlach's plans to the technical requirements of the Hydraulic Code, particularly WAC 220-660-380, Mr. Siu noted that the pier at the end of the catwalk would be wider than normally allowed, the catwalk itself would start too low over the beach, and the float Mr. Gerlach intended to

build would be too wide. The Hydraulic Code contains technical requirements that residential piers not be wider than six feet, that they be six feet above the substrate, and that floats be no wider than eight feet. WAC 220-660-380.

Mr. Gerlach said he needs the wider L-shaped section of his pier so a person in a wheelchair can maneuver at the end of the catwalk in the space before the ramp begins to descend to the right. VRP 688–89. Mr. Siu also considered the slope of Mr. Gerlach's yard and determined that for the catwalk pier to be six feet above the beach at its lowest point, it would have to start unreasonably far up the lawn, or be reached with four feet of stairs. VRP 685–86.

Mr. Siu knew departing from the technical requirements of the Hydraulic Code would result in increased shading below the piers. The Hydraulic Code permits departures from the technical requirements when the departure will not cause a loss of or injury to fish life, or degradation of habitat that supports fish life. WAC 220-660-070(1)(d). Mr. Siu determined that,

given the absence of underwater vegetation where the wider pier would be high above the water, and because the saltgrass and pickleweed on the beach are far enough from where the proposed pier would be too low (see photos, AR 1242–43, 1423–25), the site-specific conditions meant departing from the Hydraulic Code would not result in significant impacts to fish life. VRP 686.

The Hydraulic Code imposes functional grating requirements on overwater structures to minimize the impacts on fish life and habitat from shading. Functional grating is an expression of the amount of holes and space in overwater decking that allows light to pass through, reducing the shading impacts on the water below. VRP 599. The Hydraulic Code requires functional grating between 30 percent and 60 percent of an overwater surface depending on the orientation and construction of the structure. WAC 220-660-380. In this case, Mr. Siu determined that any impacts resulting from the increased width of the dock could be adequately minimized with an

increase in the functional grating over the entire overwater structure to full, 100-percent functional grating. VRP 690.

Mr. Siu also noted that the float dimensions exceeded that allowed in the Hydraulic Code. Absent a justification from Mr. Gerlach, Mr. Siu did not approve the larger dimensions and issued the HPA in accordance with the narrower regulatory requirements. VRP 693, 698. Mr. Gerlach must follow the dimensions in the HPA where they deviate from his plans. VRP 549–50, 680. Mr. Gerlach never expressed any confusion about the construction authorized by the HPA, and he did not appeal those changes. VRP 681.

Other construction requirements in the Hydraulic Code were not present in Mr. Gerlach's plans, such as notations about functional grating percentages, but Mr. Siu included them in the HPA and drew Mr. Gerlach's attention to them. *See* VRP 696–97. Mr. Siu also included several conditions in the HPA to ensure compliance and enforceability, such as site visits by himself or another biologist during construction (provisions 4–5), locating

benchmarks prior to construction (provision 36), no impact or removal of the pickleweed and saltgrass during construction (provision 37), and reiterating that the HPA does not authorize the placement of beach nourishment or sediment (provision 40). AR 1347–54.

Mr. Siu issued an HPA in September of 2019 that was the most customized he had ever issued. VRP 673. As Mr. Siu told the Board, "I erred on the side of the resource. When I'm lacking information, I always err on protecting the resource." VRP 674. In the end, Mr. Siu did not issue an HPA he believed Mr. Gerlach *wanted*, but he did issue an HPA "appropriate in terms of meeting the Hydraulic Code 220-660 in terms of meeting the no net-loss standard." VRP 711–12.

F. Sound Action's appeal to the Board failed to overcome summary judgement in part, and failed to demonstrate WDFW incorrectly interpreted or applied the Hydraulic Code.

Sound Action timely appealed HPA 2019-6-421+02 to the Pollution Control Hearings Board (Board). In preparation for the appeal, Sound Action's Executive Director Amy Carey reviewed

the application and permit file for the Gerlach HPA on WDFW's publicly accessible online Aquatic Protection Permitting System. VRP 168. The materials in the online permitting system include Mr. Gerlach's JARPA (AR 1389–1405), a 2012 underwater vegetation report by Aspect Consulting (AR 1434–43), the SEPA checklist and City of Bainbridge Island combination SEPA/permitting document (AR 1367–88, 1444–46), and a slew of other application materials. Ms. Carey did not visit the site before filing the appeal, or before testifying before the Board. VRP 95.

The Board resolved one substantive issue on summary judgement—WDFW properly waived the requirement for a new underwater vegetation survey under WAC 220-660-350. In briefing the motion, co-respondents moved to strike portions of declarations by Ms. Carey on the basis that she presented opinions outside the areas of her expertise or her personal knowledge. AR 656–66, 809–16. In ruling on the motions to strike, the Board wrote "Carey's statements on her practical

experience and her CV do not indicate any formal education in biology or other ecological sciences, which would provide the requisite scientific knowledge to opine on eelgrass or other aquatic vegetation," and that the Board "takes Carey's practical experience, and her lack of formal education in biology or ecological sciences, into consideration when it reviews the opinions contained in her declarations." AR 846. Ultimately, the Board found that Ms. Carey's opinion about the presence of underwater vegetation based on her review of the project file and of aerial photos to be "general extrapolations about the possible presence of kelp" that were "insufficient to rebut Siu's and Croker's multiple surveys, survey reviews, and site observations." AR 850. The Board "does not assign much weight to Carey's opinion on the impacts of the proposed pier because it is speculative." AR 851.

Prior to the hearing several months later, the co-respondents cited Ms. Carey's lack of personal knowledge about the site conditions as one of several grounds for written motions

in limine. AR 942–63. Presiding Officer Margaret Lee allowed Sound Action to lay foundation through Ms. Carey's testimony, then ruled to limit the scope of Ms. Carey's expert testimony to the areas of her *actual* expertise, finding that she did not possess the qualifications, experience, or scientific knowledge to opine on matters of scientific nearshore ecology. VRP 117–119; AR 1138–43. In her written ruling, Presiding Officer Lee discussed each of the methods a witness could qualify as an expert under ER 702—scientific knowledge, skill, experience, training, and education—and broke down, method by method, where Ms. Carey fell short. AR 1139–43. Presiding Officer Lee also limited Ms. Carey from presenting evidence relating to site-specific characteristics, as she had no personal knowledge of the Gerlach property. VRP 118; AR 1143.

The Board took testimony from Ms. Carey on behalf of Sound Action, and from WDFW's Randi Thurston for her expertise and explanation of the HPA process and WDFW's interpretation and application of the Hydraulic Code.

Ms. Thurston first joined WDFW in 2001 as a habitat biologist in Kitsap and Jefferson Counties, then as the Habitat Program's Protection Division Manager. AR 1313–14. She served as the agency's HPA Protection Division Manager, and developed the policies and rules in place in 2019. VRP 503–10. The Board also heard from Mr. Siu regarding his consideration of Mr. Gerlach's application, his site-specific observations and characteristics of the habitat, as well as his evaluation of the impacts to fish life likely to be caused by the project. On June 9, 2021, the Board issued its Findings of Fact, Conclusions of Law, and Order upholding the HPA, and the Presiding Officer delivered her written order on the motions *in limine*. AR 1087–1145. Sound Action timely petitioned for judicial review in Thurston County Superior Court.

The Thurston County Superior Court upheld the rulings of the Board and of the Presiding Officer on all challenged issues, finding either substantial evidence to support challenged Findings of Fact, a proper use of discretion in excluding evidence

and limiting Ms. Carey's testimony, and either proper deference or the correct legal conclusions on challenged Conclusions of Law. Sound Action timely sought review by this Court.

Sound Action challenges the Board's decisions, asserting the following, among other errors:

1. The HPA is invalid because the application was incomplete;
2. The HPA is invalid because the HPA provisions differ from the application materials affecting its ability to be enforced;
3. The bulkhead portion of the project should not have been permitted per a former, inapplicable statute;
4. The limitation of Ms. Carey's expert witness testimony was in error; and,
5. The HPA fails to adequately protect fish life.

Sound Action's challenges must fail given the ample evidence in this case and the Board's careful consideration of WDFW's interpretation and application of the Hydraulic Code.

III. ARGUMENT

Judicial review of agency action is governed by the Administrative Procedure Act (APA), which directs the review apply the following four standards:

> (a)The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;
>
> (b)The validity of agency action shall be determined in accordance with the standards of review provided in [RCW 34.05.570], as applied to the agency action at the time it was taken;
>
> (c)The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and
>
> (d)The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

RCW 34.05.570(1).

These standards apply to judicial review of a final administrative action. *Tapper v. State Empl. Sec. Dep't*, 122 Wn.2d 397, 497, 858 P.2d 494 (1993). Relief may be granted in judicial review of adjudicative proceedings only if one or more of the circumstances identified in RCW 34.05.570(3) are met. Pertinent here, a reviewing court may reverse an agency decision

when it is *ultra vires*, when the agency has erroneously interpreted or applied the law, when the order is inconsistent with a rule of the agency without an explanation from the agency based on facts and reasons to demonstrate a rational basis for the inconsistency, when the order "is not supported by evidence that is substantial when viewed in light of the whole record before the court," or when the order is arbitrary or capricious. RCW 34.05.570(3)(b), (d), (e), (h), (i); *Scheeler v. Dep't of Empl. Sec.*, 122 Wn. App. 484, 487–88, 93 P.3d 965 (2004). In reviewing agency action, a court does not substitute its judgment for that of the agency and "will upset its determination only if the evidence establishes it was arrived at by unlawful, arbitrary or capricious action." *State ex rel. Rosenberg v. Grand Coulee Dam School Dist. No. 301 J*, 85 Wn.2d 556, 563, 536 P.2d 614 (1975).

A. Standards of review are highly deferential to the agency and prevailing party on review.

This Court engages in *de novo* review of the agency's legal conclusions. RCW 34.05.570(3)(a), (b), (c), and (d); *Franklin Cnty. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d

113 (1982), *cert. denied*, 459 U.S. 1106 (1983). Courts grant substantial weight to an agency's interpretation of an ambiguous statute that it administers and interprets. *Public Util. Dist. No. 1 of Pend Oreille Cnty. v. Dep't of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002). This is especially true when the agency has expertise in a certain subject area. *Inland Empire Distrib. Sys., Inc. v. Utils. & Transp. Comm'n*, 112 Wn.2d 278, 770 P.2d 624 (1989). Courts also give substantial weight to an agency's interpretation of its own rules. *Tapper*, 122 Wn.2d at 403. This deference is due "absent a compelling indication" that the regulatory interpretation conflicts with legislative intent or is *ultra vires*. *Silverstreak, Inc. v. Washington State Dep't of Labor & Indus.*, 159 Wn.2d 868, 884–85, 154 P.3d 891 (2007); *see also Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004).

Findings of fact must be supported by substantial evidence. *See* RCW 34.05.570(3)(e); *Terry v. Employment Sec. Dep't*, 82 Wn. App. 745, 748, 919 P.2d 111 (1996). This means

"evidence that is substantial when viewed in light of the whole record before the court." RCW 34.05.570(3)(e); *Bond v. Dep't of Soc. & Health Servs.,* 111 Wn. App. 566, 572, 45 P.3d 1087 (2002). This standard is also "highly deferential" to the agency fact-finder. *ARCO Prods. Co. v. Wash. Utils. & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). It is also deferential to WDFW in this proceeding because courts view the evidence in the light most favorable to the party that prevailed in the highest administrative forum with a fact-finding authority. *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). When reviewing a mixed question of law and fact, courts apply the *de novo* standard to the law portion and the substantial evidence standard to the factual portion. *See Tapper*, 122 Wn.2d at 403.

If looking at the whole record, there are sufficient facts from which a reasonable person could make the same finding as the agency, the agency's finding should be upheld even if the reviewing court would make a different finding from its reading

of the record. *See Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 676 n.9, 929 P.2d 510, *review denied*, 132 Wn.2d 1004 (1997). Further, reviewing courts accept the fact-finder's determinations of witness credibility and the weight to be given to reasonable but competing inferences. *Id*. Courts do not retry factual issues and accept administrative findings unless the entire record leaves the court with a definite and firm conviction that a mistake has been made. *Univ. of Wash. Med. Ctr. V. Dep't of Health,* 164 Wn.2d 95, 102, 187 P.3d 243 (2008). The existence of credible evidence contrary to the agency's findings is not sufficient itself to label those findings clearly erroneous. *Id*.

B. The Presiding Officer has authority to rule on all evidentiary issues under relaxed standards of admissibility guided by the Rules of Evidence, and did not abuse her discretion in the evidentiary rulings in this matter.

Sound Action assigns error to two evidentiary rulings by the Presiding Officer—limiting the scope of expert testimony by its executive director Ms. Carey, and exclusion of federal

documents related to federal environmental permitting and project review.

While administrative hearings do use a relaxed criteria for admissibility—evidence is "admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." WAC 371-08-500(1)—a Presiding Officer, like a judge in a trial court, has full authority to govern the admission and presentation of evidence, including expert testimony. *See* WAC 371-08-475 through 515. The Presiding Officer has authority to rule on all procedural matters, objections and motions, to secure evidence to fairly and equitably decide the appeal, to regulate the course of the hearing, and to take any other action necessary and authorized by law. WAC 371-08-390(3), (6), (12), (14). The Presiding Officer may, "either with or without objection, exclude inadmissible evidence or order cumulative evidence discontinued." WAC 371-08-515. The Presiding Officer may also "exclude evidence that is irrelevant, immaterial,

or unduly repetitious." RCW 34.05.452. The Presiding Officer is not bound by the Rules of Evidence, but may use the rules as a guide in weighing admissibility. RCW 34.05.452(2); WAC 371-08-300(1).

1. The Presiding Officer appropriately limited the testimony of Sound Action's executive director to the areas of her expertise, and correctly ruled she lacked the scientific knowledge and training to be helpful to the board.

The sufficiency of a witness' qualifications to express an expert opinion is a matter within the trial court's (or Presiding Officer's) discretion. *State v. Steward,* 34 Wn. App. 221, 660 P.2d 278 (1983); *Harris v. Robert C. Groth, M.D., Inc., P.S.*, 99 Wn.2d 438, 450, 663 P.2d 113 (1983). The decision to admit or exclude expert testimony is within the discretion of the trial court and will not be disturbed absent a showing of an abuse of that discretion. *State v. Swan*, 114 Wn.2d 613, 655, 790 P.2d 610 (1990); *State v. Mak*, 105 Wn.2d 692, 715, 718 P.2d 407 (1986).

An expert may not testify about information outside their area of expertise. *L.M. by and through Dussault v. Hamilton*,

193 Wn.2d 113, 135, 436 P.3d 803 (2019) (hereafter *L.M.*) (internal citations omitted). Qualifications of expert witnesses are to be determined by the trial court within its sound discretion, and rulings on such matters will not be reversed absent a manifest abuse of discretion. *State v. Quigg*, 72 Wn. App. 828, 837, 866 P.2d 655 (1994). When determining whether a witness is an expert, courts should look beyond academic credentials. *Harris*, 99 Wn.2d at 449–50. When making the determination, courts must consider whether the expert has "sufficient expertise in the relevant specialty." *L.M.*, 193 Wn.2d at 135. To find abuse of discretion, a court must be convinced that no reasonable person would take the view adopted by the trial court. *Id*. at 135. In performing this gatekeeping responsibility, the judge should focus primarily on Evidence Rule 702, which allows admission of scientific knowledge that will assist the trier of fact. *Reese v. Stroh*, 128 Wn.2d 300, 907 P.2d 282 (1995), *affirm on other grounds*,. Evidence Rule 702 involves a two-step inquiry:

(1) whether witness qualifies as an expert; and (2) whether expert's testimony would be helpful to the trier of fact. *Id*. at 306.

Though Sound Action may disagree with and debate the Presiding Officer's decision, when the relevance and helpfulness of expert testimony is debatable, there is no abuse of discretion in excluding the testimony on tenable grounds. *State v. Arndt*, 194 Wn.2d 784, 453 P.3d 696 (2019). Sound Action has failed to demonstrate that the Presiding Officer abused her discretion here. Sound Action mischaracterizes the decision to exclude Ms. Carey's opinions on the science of nearshore ecology and biology as based only on her lack of published articles or field studies. Ap. Brief at 23, 29. The Presiding Officer appropriately found that while Ms. Carey may be an avid reader of scientific literature, scientific knowledge requires experience and familiarity with the scientific method and procedures of science. AR 1139. The Presiding Officer found that Ms. Carey does not have experience working with the scientific method, either through higher education, research, experimentation, or

peer-reviewed writing or publication. The extent of Ms. Carey's knowledge has not shown to have been tested within the scientific community. AR 1140. As a result, the Board has "no way of knowing if Ms. Carey's scientific opinions are reliable and they are therefore not helpful to the board." *Id.* The Presiding Officer also cited to an admission by Sound Action in a case before the Board three years earlier that "Ms. Carey's expertise lies in her experience with WDFW's practices ... and that she is not an expert in marine biology." AR 1138, *citing Sound Action v. Dep't of Fish & Wildlife and Neiders*, PCHB No. 17-027, p. 2 (June 1, 2018).

Sound Action argues that, under the PCHB's previous ruling in *Confederated Tribes*, the only question for the Presiding Officer is "whether the witness's knowledge of the subject matter is such that his opinion will most likely assist the trier of fact in arriving at the truth." Ap. Brief at 25; *Confederated Tribes of the Umatilla Reservation, et al. v. Dep't of Ecology*, PCHB No. 03-075, Order on Motions in Limine, 10 (Feb. 27, 2004). Presiding

Officer Lee considered this test and determined that Sound Action had failed to show how Carey's "opinions involving scientific evidence would be helpful in resolving the issues before this board." AR 1138–39 (emphasis added).

Notably, the Presiding Officer did find Carey has expertise to offer that would be helpful to the board, writing that the evidence and Carey's testimony "demonstrated her expertise in the HPA process and the Hydraulic Code that would be helpful to the Board." *Id*. To the extent Sound Action argues that Ms. Carey would have been able to assist the Board by discussing nearshore habitats, Sound Action ignores that Ms. Carey did indeed present such testimony and laid the foundation for admission of several scientific studies. *See* VRP 257–59, 266–69, 328–31, 334–35, 342–45. Sustained objections by the respondents stopped Ms. Carey from extrapolating those studies to the Gerlach site, a place she had not visited and of which she had no personal knowledge.

Further, to the extent Sound Action cites to *Confederated Tribes* and the process for qualifying an expert to suggest error in the process here, the suggestion falls flat as the Presiding Officer's ruling came after Sound Action had the opportunity to lay foundation through her testimony, and after *voire dire* by the Respondents. VRP 22–24, 89–118.

The unreliability of Ms. Carey's opinions can also be seen in the Board's handling of her opinions in response to WDFW's motion for partial summary judgement regarding the presence of eelgrass or macroalgae at the site, discussed above. AR 850–51. Ms. Carey did not bother to obtain personal knowledge of the site through a visit, or consult with others who had personal knowledge, which arguably would be a measure taken by someone with experience in the scientific method. She merely relied on "aerial and terrestrial site photos only as 'evidence of the presence of intertidal vegetation,'" and claimed that "a site photo 'appears to show[] kelp and macroalgae in the background.'" AR 850. While not an evidentiary decision, the

Board's explanation of how it considered the evidence in summary judgement reflects how it viewed the usefulness and helpfulness of her testimony.

While the Presiding Officer properly ruled Ms. Carey is not qualified to testify as an expert in "biology, marine biology, [or] near-shore or intertidal ecosystem sciences" that is not to say Ms. Carey has no expertise—the Presiding Officer also ruled that Ms. Carey could "provide expert opinion testimony on the HPA process and the Hydraulic Code." VRP 117.

2. The Presiding Officer made a thorough and reasoned ruling, not one arbitrary or capricious, on the limited expertise of Sound Action's executive director.

The appropriate standard of review for an evidentiary ruling is abuse of discretion, as discussed above. Nonetheless, Sound Action challenges the decision as arbitrary or capricious as well. Arbitrary or capricious action is that which is "willful, unreasoned, and taken without regard to the attending facts or circumstances." *Port of Seattle*, 151 Wn.2d at 589. "Where there is room for two opinions, an action taken after due consideration

is not arbitrary and capricious even though a reviewing court may believe it to be erroneous." *Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002). The Presiding Officer made her ruling in a sound and reasoned manner. Sound Action's claim ignores the seven pages of analysis written by Presiding Officer Lee wherein she held Ms. Carey's qualifications up against each of the sources of expertise outlined in ER 702. AR 1136–43. The written order that followed the oral ruling referenced Ms. Carey's resume, declarations she submitted earlier in the proceedings, and her previous experience in matters before the Board. AR 1132–33, 1138–39. Sound Action may disagree with the ruling, but it is incorrect to say that the ruling was unreasoned or without regard to the facts or circumstances.

C. The Presiding Officer properly excluded evidence of federal permitting and mitigation standards WDFW does not use in applying the Hydraulic Code.

Sound Action assigns error to the Presiding Officer's ruling to exclude Exhibits A-66 through A-72. These documents relate to federal consultation under the Endangered Species Act

and worksheets and forms to calculate impacts and mitigation for obtaining federal hydraulic permits. AR 1820–35. WDFW objected to the relevance of the documents because WDFW's no net-loss standard and methodology differs from the federal standard and methodology for calculating impacts and mitigation. AR 942, 944–45.

Evidentiary rulings are subject to an abuse of discretion standard. *Arndt*, supra. WDFW argued that none of the documents were not relevant because the federal methodology to quantifying impacts regionally is not the same as WDFW's, and because WDFW's permitting decisions are not governed or influenced by federal permitting or mitigation decisions. *See* argument VPR 286–89, 295–302. The Presiding Officer initially granted the motion *in limine* to exclude exhibits that do not contain any site-specific information, and reserved ruling on those documents that do. VPR 25–26.[3] Later, the Presiding

[3] It is notable that Sound Action never offered Exhibits A-67 or A-68; only Exhibits A-71 and A-72 were offered and denied

Officer, having not heard testimony that federal standards play a factor in WDFW's permitting process, found the remaining exhibits in question would not be relevant to the issue before the Board and properly excluded them. AR 1144, VRP 24–25, 297–304.

Sound Action assigns error and incorrectly states that evidence presented to the Board demonstrates that WDFW does use these federal calculators. Ap. Brief at 35. But, Ms. Carey's testimony does not so indicate. An applicant who is required to use the federal calculators to obtain federal permits can upload those documents to the online permitting portal, thus putting them in the permit file, if they wish (*See* VPR 647). Ms. Carey's testimony that she has "seen these in HPA Permit files and – being used" was made without reference to who uploaded them to the permit file, and without reference to use by WDFW biologists or applicants. VRP 299. Judge Lee's observation that

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admission. VRP 284–306 (foundational testimony and argument), 304–307 (offer and objections sustained).

"I still have not heard that WDFW uses this in the process," (VRP 304) combined with the different standards for shoreline permitting by WDFW and the federal government, means the exhibits would not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. The Presiding Officer's discretion to exclude these documents as not relevant was reasonable and not an abuse of her discretion.

D. WDFW lawfully waived macroalgae and eelgrass survey requirements for the Gerlach project due to the absence of such vegetation at the site.

The Board correctly ruled on summary judgment that WDFW acted within its discretion to waive the requirement of a new vegetation survey under WAC 220-660-350 given that the 2012 vegetation survey by Aspect Consulting for Mr. Gerlach (AR 1434–43) did not meet the technical requirements contained in a rule that took effect years later. VRP 594–95; AR 1307. "The department will require a person to submit a seagrass and

macroalgae survey as part of an HPA application for the following work *unless the department can determine the project will not impact seagrass and macroalgae.*" WAC 220-660-350(3)(a) (emphasis added). WDFW waived this requirement because of its knowledge that the site was devoid of such seagrass and macroalgae, in part due to the 2012 survey.

WDFW moved for summary judgement on this point, arguing that the undisputed facts showed there is not seagrass or macroalgae at the site. In support, the co-respondents presented Mr. Siu's personal observations (AR 435–39), survey results from Mr. Gerlach's consultant in 2012 and a declaration by the surveyor (AR 242–45, 230–33), a 2018 survey of the adjacent Anderson-Walker parcel (AR 443–53), and vegetation surveys performed for siting of a navigation buoy and WSDOT ferry facility (AR 454–501). To attempt to raise a genuine issue of fact, Sound Action put forth Ms. Carey's interpretation of aerial photos and a survey that suggested kelp might be nearby. AR 833, 850. The Board found her evidence to be speculative,

and that it failed to show a genuine issue of material fact. AR 849–50.

Sound Action asserts that the initial 2012 survey did not comply with the hydraulic code, and that Mr. Siu could not have seen the entire project area to determine an absence of seagrass or macroalgae existed. To support their position, Sound Action argues that the Board erred in finding that "Mr. Siu could see more than 200 feet of beach elevation" during a site visit (FOF 22). But, a sufficient quantum of evidence exists to persuade a fair-minded person of that fact—Mr. Siu testified, "I was able to observe the entirety of the footprint of his proposed project," during a time when the tide has exposed about 200 feet of tidelands. VRP 595, 669.[4] Mr. Siu's testimony substantially supports the Board's Finding of Fact No. 22, and supports the ruling on summary judgement. The claim that the 2012 survey

[4] A photo in Exhibit A-14 (that was not taken by Mr. Siu) shows a tape measure, presumably starting at the beach, extended 199 feet, showing how easily one could go 200 feet from the beach in low tide. AR 1425.

did not comply with the Hydraulic Code must fail because it seeks to hold the survey up against rules that were not in effect at the time of the survey. As the Superior Court pointed out, WAC 220-660-350, which includes the standards for an underwater vegetation survey, did not take effect until 2015. CP 223; WSR 15-02-029 (Order: 14-353) § 220-660-350 (filed 12/30/14, effective 7/1/15). WDFW had no need to request a new survey after the new rules took effect because it could determine the project will not impact seagrass and macroalgae, an exception written directly into the rule. WAC 220-660-350(3)(a).

The standard of review for a summary judgment order is *de novo*, applying the same inquiry as the trial court or the Board in this case, and viewing the facts and reasonable inferences in the light most favorable to the nonmoving party. *Ramey v. Knorr*, 130 Wn. App. 672, 685, 124 P.3d 314 (2005); *Beggs v. State, Dep't of Soc. & Health Servs.*, 171 Wn.2d 69, 75, 247 P.3d 421 (2011). Reviewing the evidence presented for summary judgement, and the governing WAC, this court should find as the

Board did, that the Department did not err in waiving the requirement for a new seagrass and macroalgae survey by Mr. Gerlach.

E. The Board properly determined WDFW issued the HPA following receipt of a complete application, and any inconsistencies between application materials and the HPA are irrelevant.

A complete application for an HPA must include the following:

> (a) General plans for the overall project;
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> (b) Complete plans and specifications of the proposed construction or work within the mean higher high water line in salt water or within the ordinary high water line in fresh water;
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> (c) Complete plans and specifications for the proper protection of fish life;
>
> (d) Notice of compliance with any applicable requirements of the state environmental policy act, unless otherwise provided for in this chapter.

RCW 77.55.021(2). The Department codified these requirements in WAC 220-660-050.

The requirement that an applicant provide a complete application to WDFW is a procedural requirement, not a substantive one. For example, the statute does not grant WDFW

authority to *deny* an HPA based on an incomplete application, which would be a decision based on the substance of the application. The purpose of requiring a complete application is so that WDFW can proceed to determine under RCW 77.55.021 whether the project adequately has the means to protect fish life.

The question of whether an application is complete is relevant to whether an application must be processed. *See* WAC 220-660-050(10) and (11) (requiring WDFW to determine whether an application is complete within 10 days and to process complete applications within 45 days). Once an application been accepted and an HPA issued, the completeness of the application is no longer relevant to the legal question of whether the HPA complied with the Hydraulic Code because the Board can receive evidence on any issue.

Once the Board's jurisdiction is secured, it may receive evidence on any disputed facts if relevant. *Port of Seattle*, 151 Wn.2d at 595–99; *Postema v Pollution Control Hearings Bd.*, 142 Wn.2d 68, 121, 11 P.3d 726 (2000) (in permit appeal,

WAC 371 08 485 allows issuing agency and all other parties to present relevant evidence). In *City of Bellingham v. Dep't Nat. Res.*, PCHB Nos. 11-125 and 11-130 (2012), for example, the Board swept aside a concern about an application's inaccuracy as it pertained to potential marbled murrelet habitat, where the Department of Natural Resources evaluated the issue, determined no habitat existed, and where the appellants provided no evidence that the agency's murrelet habitat evaluation was wrong. Other cases have also found that claims of application incompleteness are "inapplicable" once an agency approves the application. *See Hamilton v. Pollution Control Hearings Bd.*, 5 Wn. App. 2d 271, 285-86 ¶¶ 49–52, 426 P.3d 281 (2018) (concerning alleged deficiencies in a water rights application).

The Board heard ample testimony about what WDFW considers a complete application, and how the decision of completeness is separate from a biologist's decisions how to condition and issue an HPA. Ms. Thurston testified that WDFW considers HPA applications to be minimally complete for

processing purposes once WDFW has a basic understanding of the nature of the project proposed and its location. VRP 517. She testified that WDFW is flexible in making this determination and will give technical assistance to applicants who may not be savvy in the ways of environmental permitting. VRP 518–19; *see also* VRP 671–72.

Mr. Gerlach's application met the threshold of minimal completeness. Once assigned to the application, Mr. Siu understood what Mr. Gerlach intended to build—an overwater structure with a pier, boatlift, ramp, float, and a bulkhead—and where. VRP 653–55. The application and permit file included other materials with details and specifications, such as the JARPA, photos, and materials from the City's permitting process. Mr. Siu testified he needed to clarify Mr. Gerlach's intentions based on multiple versions of a bulkhead proposal, not that the plans were unclear.

Reviewing courts grant substantial weight to an agency's interpretation of an ambiguous statute it administers, as well as

to an agency's interpretation of its own regulations. *Port of Seattle,* 151 Wn.2d at 593. The Board properly deferred to the Department's interpretation of RCW 77.55 and the Hydraulic Code with respect to the threshold for statutory completeness of applications. The Board did not err in concluding that the Gerlach application was complete for purposes of the Hydraulic Code. COL 6–8 and 14–17.

Sound Action's argument that measurements and details in the application differ from the HPA, therefore making the application incomplete or the HPA invalid or unenforceable is flawed (finding error with Finding of Fact 35, Conclusions of Law 6–8, 14–17). The argument ignores that the HPA is the document that dictates construction and the means to adequately protect fish life, not Mr. Gerlach's application. *See* RCW 77.55.021. The Board correctly found, as a matter of law, that "if there is a conflict between Mr. Gerlach's plans and the

HPA, the HPA controls the construction." COL 16.[5] The absence in the application materials of details about dock grating and other common construction details, like stub piles, does not a matter as those requirements are spelled out in the HPA (compare Project Description, provisions 3, 20a–20c to WAC 220-660-380(3)–(6)). Mr. Gerlach, and any contractor he hires, will be bound by the provisions and descriptions in the HPA, not the application materials. VRP 729, 780–82. Sound Action fails to tie any deficiency in the construction details of the application to the protection of fish life, and its argument that the HPA provisions are too vague to be enforced is misplaced because enforcement is a different inquiry than whether the HPA, if followed, adequately protects fish life. Sound Action makes a similarly misplaced argument regarding the required compensatory mitigation in the form of native plantings in a large

[5] While Sound Action assigns error to this conclusion of law as one of seven regarding the completeness of the application, Sound Action does not actually attempt to contradict Conclusion of Law No. 16.

area of Mr. Gerlach's yard—Sound Action presupposes future compliance problems that are neither ripe for legal challenge, nor over which Sound Action would have standing to appeal. *See* WAC 220-660-470(3).

F. Gerlach provided WDFW with written notice demonstrating compliance with the SEPA by sharing the City's decision that references his entire project.

The State Environmental Policy Act is intended to provide information to local governments, state agencies, applicants, and the public to encourage the development of environmentally sound proposals. This environmental information, along with other considerations, is used by local and state decision-makers to decide whether to approve a proposal, approve it with conditions, or deny the proposal.[6] The contents of an applicant's SEPA checklist, wherein the applicant lists the elements of the project and answers questions about environmental impacts,

[6] Read the Department of Ecology's description and guidance to lead agencies at *https://ecology.wa.gov/Regulations-Permits/SEPA/Environmental-review/SEPA-guidance/Guide-for-lead-agencies*, last visited Aug. 23, 2022.

directs the scope of SEPA review. *See* WAC 197-11-315. Mr. Gerlach listed the bulkhead on his environmental checklist and answered questions about its potential impacts. AR 1369-70, 1372–73, 1376, 1378. The City issued a single document on Mach 22, 2013, combining its shoreline permit and SEPA determination. AR 1444–46. The document itself specifically has a section labeled "SEPA Decision" that was made "after review of *a completed environmental checklist* and other information on file with the lead agency." AR 1444 (emphasis added). Sound Action is incorrect that the denial of the bulkhead from the SSDP and silence of a bulkhead's impacts in the City's SEPA determination means the bulkhead was excluded from the project when the City performed its review.

Sound Action incorrectly states that the issuance of the SSDP triggers the SEPA review—*i.e.* the City determined what aspects of Mr. Gerlach's project it wished to permit, and *then* it performed a SEPA review of *that permitting decision* for environmental impacts. Ap. Brief, 43. Rather, it is a SEPA

checklist that defines the scope of SEPA review, not the scope of a permit. *See* "Purpose of the Checklist" paragraph at AR 1367. The rules implementing SEPA require that "all governmental agencies … consider the environmental impacts of a proposal *before* making decisions." WAC 197-11-960.

WDFW's determination that the combined shoreline permit and SEPA document issued by the City of Bainbridge Island constituted compliance with the procedural requirements of Chapter 43.21C RCW, given that the environmental checklist included the bulkhead, is consistent with SEPA. The Board agreed. COLs 9–13.

G. The Board properly found the bulkhead provisions of the HPA complied with the law at the time WDFW processed the application.

The Board correctly considered the retroactive application of former RCW 77.55.141, repealed in the summer of 2019, to Mr. Gerlach's unique situation, and found WDFW properly permitted the bulkhead pursuant to that statute that governed when WDFW began substantively applying the law to

Mr. Gerlach's application. The Superior Court agreed with the result of the Board's analysis, though it determined retroactivity need not apply and focused simply on the state of the law in effect when WDFW began considering Mr. Gerlach's application. CP 228–29. The Superior Court found that the plain language of former RCW 77.55.141, in effect at the time the Department received a complete and accurate application, required the Department to process the application under that law and issue a permit, which WDFW did. *Id.*

Under either the Board's retroactivity analysis or the Superior Court's textual application of the former statute, WSDFW properly applied former RCW 77.55.141 to Mr. Gerlach's compete application.

1. The Board considered whether the repeal of RCW 77.55.141 should have applied retroactively to an application under consideration, finding the triggering event to be the receipt of a complete application.

Under a retroactivity analysis, the "triggering event" analysis is "fundamentally an inquiry into legislative intent" that

requires looking to the subject matter regulated by the statute, and the statute's plain language. *Serv. Employees Int'l Union Local 925 v. Dep't of Early Learning*, 194 Wn.2d 546, 555–56, 450 P.3d 1181 (2019) (hereinafter *SEIU).* "A statute has retroactive effect when the precipitating event under the statute occurred before the statute's enactment." *In re Estate of Haviland*, 177 Wn.2d 68, 75, 301 P.3d 31 (2013), *citing In re Pers. Restraint of Carrier*, 173 Wn.2d 791, 809, 272 P.3d 209 (2012).

Sound Action argues that the *issuance* of the permit triggers application of the law. But the issuance of the permit, or denial, is the *culmination* of the substantive process of applying the Hydraulic Code to an application. When a Habitat Biologist *begins* the process of evaluating a proposal for the adequate protection of fish life, all procedural requirements have been met and the substantive technical requirements of the Hydraulic Code and Chapter 77.55 RCW already apply.

The discussions in *SEIU* and *Haviland* of retroactivity actually support WDFW's interpretation of retroactivity to former RCW 77.55.141—in both cases the court found a triggering event occurred when the government began *taking action* (applying the public records law to a request versus receipt of the request itself, for example). And Sound Action's citation to *Dzaman* is not helpful because there, the governor's proclamation clearly stated the triggering event at issue, making the retroactivity issue easier to determine. The triggering event for the eviction moratorium as a whole and the new requirement for the intent to sell exception is the enforcement of a judicial eviction order. *Dzaman v. Gowman*, 18 Wn. App. 2d 469, 482, 491 P.3d 1012 (2021). *Dzaman* provides little guidance as to the triggering event here.

It also ignores the "elementary considerations of fairness" important to a triggering event analysis. *SEIU,* 194 Wn.2d at 556, *citing In re Estate of Burns*, 131 Wn.2d 104, 110, 928 P.2d 1094 (1997). The Board considered this factor, viewing the

Legislature's requirement that WDFW cannot unreasonably withhold approval of an HPA under RCW 77.55.021(7)(a), as support for retroactivity in Mr. Gerlach's unique situation. The Board found applying such a change in the law at practically the last minute "would conflict with the Hydraulic Code's requirement that approval of a permit be reasonable, and would conflict with 'elementary considerations of fairness.'" COL 25, *citing* RCW 77.55.021(7)(a) and *SEIU,* 194 Wn.2d at 555–56.

2. The Superior Court considered the mandate in RCW 77.55.141 that WDFW take action, which was triggered before the statute was repealed by receipt of a complete application.

The Superior Court's analysis is similar to the Board's in that the Superior Court found a "triggering event" to be acceptance of a complete application and the processing that followed. CP 228. The Superior Court noted that former RCW 77.55.141 required that, upon this precipitating event, the Department had a legal mandate to issue an HPA under that statute. CP 229.

Former RCW 77.55.141, effective July 1, 2010, to July 27, 2019, included the following provisions:

> (2) The department shall issue a permit with or without conditions within forty-five days of receipt of a complete and accurate application which authorizes commencement of construction, replacement, or repair of a marine beach front protective bulkhead or rockwall for single-family type residences or property under the following conditions:
>
> (a) The waterward face of a new bulkhead ... shall be located only as far waterward as is necessary to excavate for footings or place base rock for the structure and under no conditions shall be located more than six feet waterward of the ordinary high water line;
>
> [...]
>
> (c) Construction of a new bulkhead ... shall not result in the permanent loss of critical food fish or shellfish habitats; […]

Former RCW 77.55.141, repealed by Laws of 2019, c. 290, § 14; AR 1342–43.

The Superior Court focused on the phrase "shall issue a permit with or without conditions" and found that the Department therefore had to follow that statute, which applied at the time the Department began to review and consider the

application, later repeal notwithstanding. CP 228. The Superior Court's analysis is simpler and tied directly to the text of former RCW 77.55.141, and provides an additional way to apply the former statute to the case at hand.

3. WDFW's consideration of the bulkhead complied with RCW 77.55.141 and the WAC at the time, contrary to Sound Action's claim of deficiencies in the process.

The Legislature did not repeal former RCW 77.55.141 until months after WDFW received a complete and accurate application from Mr. Gerlach. The inquiry is therefore whether the proposed bulkhead satisfies the requirements of the former RCW 77.55.141—a residential bulkhead, located no more than six feet waterward from the ordinary high water line, and construction would not result in the permanent loss of critical food fish or shellfish habitat. Given that Mr. Gerlach's plans met these requirements, especially given Mr. Siu's placement of the ordinary high water line, former RCW 77.55.141 required WDFW to issue an HPA for the bulkhead under the conditions contained therein, and not apply the general statute at

RCW 77.55.021. *See* former WAC 220-660-370, at AR 1333-41; see also AR 1584. Only if an application failed to meet the conditions in section (2) of former RCW 77.55.141 could WDFW apply the requirements of RCW 77.55.021. VRP 551, 626; AR 1584. Therefore, Sound Action's argument that the bulkhead provision in the HPA is improper without a needs analysis, alternatives analysis, and other application requirements contained in WAC 220-660-370 must fail. That rule explicitly stated that those requirements did not "apply to projects processed under RCW 77.55.141." AR 1328.

The application of former RCW 77.55.141 notwithstanding, Sound Action's contention that the bulkhead will result in unmitigated impacts to fish life is not supported by the evidence and reliable testimony. The two primary impacts to fish life caused by bulkheads are the loss of habitat caused by the placement of the bulkhead, and the effect of the bulkhead on sediment production and movement. Mr. Siu testified that these impacts do not exist on Mr. Gerlach's beach so long as the

bulkhead is built per the HPA landwards of the ordinary high water line. VRP 621. Mr. Siu testified extensively that his determination of this line was a conservative decision made out of an abundance of caution in favor of the resource. VRP 636. Sound Action presented no evidence that the ordinary high water line should have been located anywhere else on Mr. Gerlach's beach, or that a bulkhead that high on Mr. Gerlach's beach removes habitat or will result in a loss of fish life.

H. The HPA protects fish life and achieves no net loss by mitigating for actual impacts likely to be caused by the Gerlach proposal.

The Board correctly found that the HPA adequately protects fish life and achieves no net loss by mitigating for the impacts likely to be caused by Mr. Gerlach's proposal. Sound Action fails to carry the burden of showing otherwise.

The Hydraulic Code enumerates the risks of harm to fish life posed by construction in state waters, and spells out the technical requirements based on best available science to address these. Mr. Siu testified regarding each of these risks of harm

specific to Mr. Gerlach's project and site, and what conditions in the HPA avoided, minimized or compensated for those risks. Analyzing the risk to fish life is simplified by site conditions because Eagle Harbor is heavily developed and the habitat is "pretty degraded" (VPR 587), and "he did not have any site-specific concerns about impacts to migrating juvenile salmon given the baseline in Eagle Harbor." COL 27. Sound Action argues both that Mr. Siu did not offer that testimony, and that if so, he was wrong. But even Sound Action's recitation of the questions asked and the answers by Mr. Siu (VRP 610) indicate that Mr. Siu did not have specific concerns "at the property," meaning he did not have any site-specific concerns. Mr. Siu did discuss affects to fish life from overwater structures, but that the affects that may be present at the Gerlach site were consistent with the affects to be seen elsewhere in Puget Sound. *See* VRP 586.

The Board found credible Mr. Siu's scientific assessment that the pier starting closer to the beach than allowed by the

Hydraulic Code, and permitting a wider pier section so wheelchairs can maneuver, would not present significant harm to fish life. *See* VRP 610–11. The Hydraulic Code identifies light reduction as an impact to fish life due to shading's effect on aquatic plants and fish behavior. WAC 220-660-380(2). The Board found credible Mr. Siu's testimony that the site has no macroalgae, eelgrass, or habitats of special concern that would be inhibited by the increased shading of a larger pier. The Board also found credible Mr. Siu's expert opinion that 100-percent functional grating would adequately mitigate the effects of such shading. VRP 743.

While the scientific research presented to the Board by Sound Action shows that shading from overwater structures has an influence on migrating juvenile salmonid behavior, such as causing them to sometimes change direction and go around shading, the evidence does not show this change in behavior to be a known harm. *See generally* AR 1602–43. Mr. Siu specifically disagreed with Sound Action's interpretation of the

studies finding that juvenile salmonoids, in avoiding docks due to shading, are exposed to greater amounts of predation, saying, "That is not correct. The literature speculates on that. If you read the literature, they draw a lot of assumptions but there's no specific data [in the] literature out there." VRP 758. Sound Action's position that shading causes increased predation or lack of feeding for migrating juvenile salmonids does not have the scientific support that Mr. Siu would need, as a trained scientist, to impose conditions beyond what is required by the Hydraulic Code. He testified "…as a regulator, who's [sic] responsibility for balancing the science and people's rights. Without that solid data, I don't see how we can apply that." VRP 759. The Board found Mr. Siu's explanation credible.

Sound Action also assigns error to findings that the HPA is enforceable, arguing that the requirement of 400 square feet of native plantings in the riparian zone as compensatory mitigation for the loss of habitat from the footprint of the piles is too vague to be enforced. This argument must fail, as the testimony of

Mr. Siu regarding enforceability, as well as terms of the HPA, cast no doubt on the permit's enforceability. The permit gives Mr. Gerlach discretion to choose which plants to place, so long as they are native, and the location of the 400 square feet. AR 1348 (provision 3). While the "pink square" indicating were the plantings should occur is not measured against benchmarks, Mr. Siu testified that the riparian zone is large and he will review the plantings for compliance. VRP 732–34, 739–41. *See* AR 1419. If the plantings are inadequate, the HPA will be enforced. *Id*. If issues arise in enforcing the HPA, those are ripe for legal challenge at that time, but not in this proceeding and not by Sound Action. *See* WAC 220-660-470(3)(b).[7]

Ultimately, Mr. Siu provided ample credible testimony to show the Board he carefully crafted an HPA that addressed the site-specific conditions on Mr. Gerlach's property, the likely

[7] Notably, the plantings as compensation for the pilings was not Mr. Siu's novel idea; Mr. Gerlach included that plan in his SEPA Checklist in 2012. AR 1376.

risks to fish life caused by the construction, and that followed the mitigation sequence to avoid, mitigate, and then compensate for known risks of harm from the project to achieve no net loss. VPR 712.

IV. CONCLUSION

The Department issued Mr. Gerlach an HPA for a pier, dock, ramp, and float extending from an already-constructed gatehouse, and authorized a 70-foot bulkhead to extend parallel from the face of that gatehouse's foundation along a conservatively-placed line on the beach. The application considered by Habitat Biologist Siu in 2019 was statutorily complete, and Mr. Siu, a knowledgeable biologist with experience in Eagle Harbor, thoughtfully considered proposed deviations from the technical requirements of the Hydraulic Code. He issued a permit that, in his expert opinion, achieved no-net loss and adequately protected fish life in compliance with the Hydraulic Code. The Board properly weighed the testimony and evidence presented and appropriately deferred to WDFW on

technical and scientific issues. The Thurston County Superior Court, reviewing the HPA *de novo*, similarly granted the Board deference and upheld the permit. Sound Action has failed to meet its burden of showing otherwise. This Court should affirm the Board's Findings of Fact, Conclusions of Law, and Order upholding the HPA.

I hereby certify that this brief contains 11,787 words exclusive of the title sheet, table of contents, table of authorities, certificate of compliance, certificate of service, and signature block.

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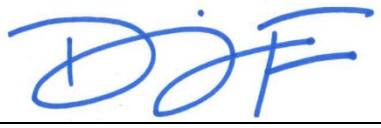
CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be filed with the Clerk of the Court, Washington State Court of Appeals, Division II via the CM/ECF system, which will send notification of such filing the to the following:

Kyle A. Loring, Counsel for Appellant
Marcus Gerlach, Co-Respondent
Lisa M. Peterson, Counsel for Pollution Control Hearings Board

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 24th day of August, at Olympia, Washington.



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